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Afterword

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AFTERWORD

THEODORE J. ST. ANTOINE*

A unifying theme of this Symposium is as old and enduring as the common law: when and how can a well-established, successful adjudicative institution be adapted to meet the demands of new and substantially different situations? There have been splendid triumphs of transference, such as Lord Mansfield's appropriation of the law merchant in the eighteenth century as a major building block of modern commercial law.¹ There have also been embarrassing failures, like the abortive effort to transport American labor law concepts en masse into the alien British environment of the early 1970s.² The common question confronting the participants in this Symposium is whether our private, voluntarily developed system of labor arbitration, or a system patterned on it, can operate effectively in a workplace that is increasingly subject to governmental regulation, including resurgent state regulation under more relaxed pre-emption law; in the public sector where the employer is the sovereign itself; and in industrial settings that in recent years have been more and more likely to lack a union presence.

Charles Craver's comprehensive article, *Labor Arbitration as a Continuation of the Collective Bargaining Process*,³ provides not only a valuable overview of the legal treatment of labor arbitration since the *Steelworkers Trilogy* but also what Craver considers the necessary implications of Justice Douglas's acceptance of the notion that labor arbitration is "part and parcel of the collective bargaining process itself."⁴ Perhaps most important, the concept supports the Supreme Court's tight limitations on judicial review of arbitration decisions because, as Craver puts it, courts in enforcing awards "merely direct the contracting parties to honor the results of their own private, dispute-resolution machinery."⁵

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1. T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 350, 657-70 (5th ed. 1956).

2. O. KAHN-FREUND, *LABOUR AND THE LAW* 190 (2d ed. 1977).

3. 66 CHI.-KENT L. REV. 571 (1990).

4. *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 578 (1960).

5. See *supra* note 3, at 591.

Today, as Craver discusses, the hottest issue concerning arbitral finality probably involves awards that may conflict with sound public policy—awards putting back to work alcoholic airline pilots, gun-toting postal workers, psychologically unstable or rule-flouting workers in nuclear power plants, and the like. In all or nearly all these instances, however, the employer would have violated no statute or regulation if it had taken on its own the action the arbitrator ordered. As between the parties, therefore, the arbitral award should be as binding as any other just cause determination lacking arguably public overtones. Once again, an employer in contesting an award is simply trying to escape its own contractual commitments, this time on a policy ground no legislature or agency has seen fit to adopt. The Supreme Court in its *Misco* decision,⁶ analyzed by Craver, seems generally in accord with this characterization of what is occurring.

For all its apparent appeal as a rationale for sustaining arbitration awards, and despite the high authority behind it,⁷ the continuation-of-the-bargaining-process theory is not necessary, in my opinion, as a basis for arbitral finality, and in some instances it may be positively mischievous. As I have argued elsewhere at greater length,⁸ the simpler and more conventional explanation of the courts' deference to arbitration awards is not something peculiar to collective bargaining. The parties have jointly commissioned the arbitrator to give their agreement a definitive reading—"final and binding" is the customary phraseology—and a court is doing no more than enforcing their contract to that effect, as it would any other contract. In decisions long predating the *Steelworkers Trilogy*, the courts held that they would not review the merits of arbitral awards in commercial settings and would look only at procedural fairness, fraud, partiality, or total irrationality.⁹ The contractual nature of the arbitration process was stressed in most opinions.

The potential mischief that I see flowing from an excessive emphasis on arbitration as a continuation of collective bargaining harks back to an

6. *Paperworkers v. Misco, Inc.*, 484 U.S. 29 (1987). The Court did not go so far, however, as to say that an arbitral award should be enforced so long as it does not order illegal conduct.

7. In addition to the Supreme Court in *Warrior & Gulf*, *supra* note 4, see Feller, *The Coming End of Arbitration's Golden Age*, in NAT. ACAD. ARB., PROC. 29TH ANN. MEETING, ARBITRATION-1976, at 97, 107 (B. Dennis & G. Somers eds., 1976). In light of the common law's historic hostility toward arbitration, I find more force in the bargaining process theory as a special basis for upholding executory agreements to arbitrate rather than the subsequent awards.

8. St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and its Progeny*, 75 MICH. L. REV. 1137, 1140-42 (1977).

9. See, e.g., *Burchell v. Marsh*, 58 U.S. (17 How.) 344 (1855); *Park Constr. Co. v. Independent School Dist.*, 216 Minn. 27, 11 N.W. 2d 649 (1943); see also *Harrell v. Dove Mfg. Co.*, 234 Or. 321, 381 P.2d 710 (1963). Cases are collected in 5 AM. JUR. 2d *Arbitration & Award* § 167 (1962); 6 C.J.S. 2d *Arbitration* § 2, at 162-64 (1975).

ancient debate between an influential pioneering arbitrator, George Taylor, and J. Noble Braden, then tribunals vice president of the American Arbitration Association.¹⁰ Taylor believed strongly that arbitrators should be activist intervenors in the parties' disputes: mediating, educating, and otherwise helping the parties flesh out their "skeleton" agreements. Yale Law School Dean Harry Shulman, the famous Ford umpire, was of a like mind. Braden and others, such as Columbia Professor William Leiserson, vigorously disagreed, advocating a judicial model as more in keeping with the trend toward increasingly detailed contracts and the parties' own provisions strictly limiting arbitrators' authority. The Taylor-Shulman approach undoubtedly had its greatest appeal in the formative years of collective bargaining, when inexperienced negotiators lacked the skills to anticipate problems and address them effectively. Ultimately, however, the Braden view pretty much prevailed, perhaps primarily because that is what the parties wanted. Indeed, even today I find nothing so rankles advocates for both unions and management as an arbitrator who is overly intrusive at a hearing.

Of course I accept Craver's position that arbitrators should not be mere passive spectators, especially when they are unclear about the meaning of some piece of evidence that has been submitted to them. But I think he treads on dangerous ground when he becomes so enthralled with their role as "participants in the continuing collective bargaining process"¹¹ that he encourages actual intervention, even to the extent of mediation. A few rare souls may have the diplomatic skills to pull this off without arousing resentment and proving counterproductive. Even then, as Craver recognizes, there is the risk that a failed mediation will leave the arbitrator burdened with confidential disclosures he is supposed to disregard when he resumes his arbitral role. (I must not think of elephants!) I further agree that if the disputants seem to be overlooking an obvious solution to their problem, a quiet huddle with counsel in the corridor may serve a useful purpose. Nor would I deny that in particular cases a union and an employer may come to have such a high regard for their permanent umpire that they actively invite her to switch to a mediating mode. But ordinarily, the relatively sophisticated parties in the contemporary world of labor relations can be assumed to have set out to engage a judge for their dispute when they have reached the last step in their grievance procedure, and that is generally what they should get.

10. For a good summary of the controversy, see Nolan & Abrams, *American Labor Arbitration: The Maturing Years*, 35 U. FLA. L. REV. 557, 611-13 (1983).

11. See *supra* note 3, at 627-28.

To my mind Craver is on target when he endorses the NLRB's *Collyer*¹² policy of deferring to arbitration in section 8(a)(5) refusal-to-bargain cases but rejects the Board's *United Technologies*¹³ policy of deferring as well in section 8(a)(3), 8(b)(2), and similar individual rights cases. The essential distinction, theoretically, is between contractual and statutory rights, and, pragmatically, between group and individual interests. It is the Board's function to adjudicate NLRA statutory claims, initially, and an arbitrator's (or, more precisely, a court's) function to adjudicate contractual claims. As I see it, an employee should not lose his statutory access to an antidiscrimination remedy just because his union has secured an additional contractual claim—at least not if the union hasn't expressly waived his right of resort to the Board, and any such waiver, naturally, ought to raise other issues. Craver makes all the right arguments about this and I needn't repeat them.

On the other hand, the refusal-to-bargain case involving an asserted contractual defense ordinarily turns on group claims dependent on a particular contract interpretation. Contract interpretation and enforcement, even though sometimes necessary, is not the primary business of the Board.¹⁴ It thus seems appropriate to "defer" to arbitration in many section 8(a)(5) cases. I have one cautionary word. An arbitrator's ruling of no contractual violation, even if correct, does not necessarily mean no statutory violation. The arbitrator may have concluded the employer's action did not breach the contract, not because the contract authorized the action, but because the contract simply did not cover the matter. That would still leave open the question of possible unilateral action concerning a mandatory subject, in violation of the statutory duty to bargain.¹⁵

If a thesis can possess both power and subtlety, then Michael Harper has managed the feat. In his article, *Limiting Section 301 Preemption: Three Cheers for the Trilogy, Only One for Lingle and Lueck*,¹⁶ Harper starts out with the forthright concession that collective bargaining and labor arbitration in the post-Golden Age¹⁷ no longer have the

12. *Collyer Insulated Wire*, 192 N.L.R.B. 837 (1971).

13. *United Technologies Corp.*, 268 N.L.R.B. 557 (1984).

14. In enacting § 301 of the Taft-Hartley Act, 29 U.S.C. § 185 (1988), Congress chose not to make breaches of collective agreements as such unfair labor practices subject to the remedial power of the NLRB. Instead, the enforcement of the labor contract was left to "the usual processes of the law." H.R. Rep. No. 510, 80th Cong., 1st Sess. 42 (1947). But cf. *NLRB v. C&C Plywood Corp.*, 385 U.S. 421 (1967).

15. See *NLRB v. C&C Plywood Corp.*, 385 U.S. 421 (1967).

16. 66 CHI.-KENT L. REV. 685 (1990).

17. See Feller, *supra* note 5. For Professor Feller, the Golden Age was a period of maximum union-management autonomy in workplace governance.

field of workplace regulation all to themselves (they never really did), but must accommodate a whole host of old and new federal and state laws on the subject.

Harper's major contribution is to rewrite the Supreme Court's opinions in the *Lueck*¹⁸ and *Lingle*¹⁹ cases. He convincingly argues that the Court went astray in making section 301 preemption of a state law claim turn on the question of whether there has to be an interpretation—at least any significant interpretation—of a collective bargaining agreement. Harper observes that the great virtue of the *Trilogy* was to create salutary yet revocable presumptions for the parties rather than to saddle them with conclusive rules of law, and that such channeling without compulsion should serve as a model for most applications of section 301. He then goes on to advocate a new preemption principle: there should be no preemption of a state law action that exists independently of a collective agreement and can proceed without reference to rights secured or duties imposed by that agreement. Moreover, the preemption of state law rights that depend on the terms of an agreement ought to be only a rebuttable presumption, based on the likelihood that most employers and unions do not intend to create state-defined rights and obligations by negotiating a labor contract.

The power of this analysis lies in its imaginative synthesis of several different strands of Supreme Court policy and doctrine—the *Lincoln Mills*²⁰-*Lucas Flour*²¹ emphasis on uniform section 301 law as a means of promoting free collective bargaining; the flexibility fostered by the *Trilogy* through the use of presumptions reversible by the parties; and the *Metropolitan Life*²²-*Lingle* recognition of the value of sustaining, even for unionized employees, certain state minimum benefit or employee protection laws. Specifically, the advantage of a more relaxed preemption standard is to clear the way for applying to organized work forces such salutary state laws as those guaranteeing a right to privacy and protecting employees against wrongful discharge.

Subtlety comes into play with Harper's handling of particular applications of his proposed new preemption rules. Thus, for example, he would not deny an employee the benefit of a state law right merely because a collective agreement *might* have waived the right, and there would have to be a resort to contract interpretation to make that deter-

18. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985).

19. *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988).

20. *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957).

21. *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95 (1962).

22. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985).

mination. Going back to basics, Harper stresses that even if uniform federal law must be used to decide whether a collective agreement has waived or compromised a minimum state guarantee (the author raises some good questions about even that seemingly unchallengeable proposition), there is no necessity for arbitration under the contract in such a case in order to preserve industrial peace. A state court should therefore be able to deal with the issue directly.

Similarly, Harper displays much subtlety in distinguishing between the kinds of state minimum benefit laws that should and should not be preempted. Drawing upon the earlier *Oliver*²³-*Machinists*²⁴ preemption rulings, the author develops a more general theory that the ultimate test should be the extent of the burden imposed on free collective bargaining. A state law that conditions certain nonnegotiable benefits on an employer's granting of other specified benefits will discourage the negotiation of the latter more than an unconditional benefit law that operates without regard to the parties' own bargaining. That distinguishes *Lueck* (preemption) from *Lingle* (nonpreemption) but leaves unexplained *Metropolitan Life*, where Massachusetts was upheld in conditioning its requirement of mental health care upon an employer's providing of general health insurance. Harper takes his best (but not entirely convincing) shot at rationalizing *Metropolitan Life* by pointing out that the state law there granted an "additional independent [?] substantive benefit,"²⁵ while the state law at issue in *Lueck* "provided additional remedial protection . . . for a benefit created by the collective agreement."²⁶ There is more pragmatic force to Harper's suggestion that a state may be entitled to infer from an employer's provision of one substantive benefit that it is economically capable of providing another substantive benefit, but that a state should not be entitled to intrude on the remedial scheme collectively devised by a union and an employer for the enforcement of their agreement.

Harper's overall stance is by no means antipreemption. Thus, he would approve the result in *Steelworkers v. Rawson*,²⁷ where the Supreme Court rejected a claim by miners' survivors under Idaho's general tort law that a union's negligent inspection of a mine had contributed to the miners' accidental deaths. The Court reasoned that the union's right to inspect arose out of a collective agreement and hence the scope of its

23. *Teamsters Local 24 v. Oliver*, 358 U.S. 283 (1959).

24. *Machinists Lodge 76 v. WERB*, 427 U.S. 132 (1976).

25. *See supra* note 16, at 730.

26. *Id.*

27. 495 U.S. 362 (1990).

duty depended on the terms of that agreement. Harper disputes this reasoning but concludes that preemption was appropriate under his theory because otherwise unions would be discouraged from negotiating an increasingly important employee benefit—a safe workplace.

Harper may not have all the answers to the many conundrums still being posed by the constantly evolving, persistently perplexing subject of federal preemption. But his elegant essay has persuaded this reader that the Supreme Court's reliance on the need to interpret a collective agreement as the touchstone in *Lueck-Lingle* situations is much too simplistic. The Court in *Garmon*,²⁸ *Machinists*,²⁹ and *Sears, Roebuck*³⁰ had to disavow earlier attempts to establish "bright line" tests in this area. Harper's innovative formulation of a comprehensive preemption standard is more a matter of degree. That sometimes makes distinguishing among cases such as *Lueck*, *Metropolitan Life*, and *Rawson* less predictable. In my opinion, however, an approach like Harper's, which focuses on such fundamental values as the integrity and efficacy of the collective bargaining process, will prove in the long run both more realistic and more enduring.

Ann C. Hodges effectively dismantles several conventional myths in *The Steelworkers Trilogy in the Public Sector*.³¹ She starts off, quite appropriately, by underscoring the practical importance of collective bargaining and arbitration in government employment. Even as private sector unionization declined precipitously over the past three decades, the organization of public employees soared spectacularly, reaching almost fifty percent of the twelve million full-time work force by the late 1970s.³² Hodges then goes on to show that "while courts frequently pay lip service to the *Trilogy* principles [in public sector arbitration cases], in reality they often fail to apply them."³³ Finally, in the most significant portion of her article, she tackles what I have described as the "myths."

First, it has been argued that the limited experience with arbitration in public employment militates against any presumption of arbitiability on the basis of demonstrated efficacy or acceptability. As Hodges points

28. *San Diego Bldg. Trades v. Garmon*, 359 U.S. 236 (1959) (shifting emphasis from adequacy of federal remedy to "arguably" protected or prohibited nature of conduct itself).

29. *Supra* note 20 (conduct neither protected nor prohibited may still be preempted if central to the federal regulatory scheme).

30. *Sears, Roebuck & Co. v. San Diego Dist. Carpenters*, 436 U.S. 180 (1978) (conduct "arguably" protected or prohibited may nonetheless be subject to state regulation under certain circumstances).

31. 66 CHI.-KENT L. REV. 631 (1990).

32. H. EDWARDS, R. T. CLARK, JR. & C. CRAVER, *LABOR RELATIONS LAW IN THE PUBLIC SECTOR* 7-8 (2d ed. 1979).

33. *See supra* note 31, at 634.

out, however, arbitration at its best offers the same advantages in the public as in the private sector, namely, a fast, cheap, and informal method of dispute resolution. She also notes that many state statutes specifically authorize or mandate grievance arbitration. She might have added that nearly all these statutes, as well as the more generalized state collective bargaining laws, postdated the 1960 *Trilogy*, and, absent some express reservation, could fairly be assumed to have embraced its teachings.

Next, a number of scholars, public officials, and state courts assert that different rules should apply because of the employer's status as the sovereign, its special responsibility to meet the manifold and often essential needs of the citizenry, and its public accountability for decisionmaking based on the political process and not the competitive market. Some of the most articulate proponents of this view of the public employer, at least at the initial contract negotiation stage, were a group of Yale Law School professors.³⁴ I have sometimes speculated that they may have been overly influenced by their geographical proximity to New York City during a period of its most shortsighted and financially disastrous labor relations. In any event, I agree with Hodges that to the extent that public policy is implicated in the enforcement of an arbitration agreement or award, substantially the same criteria should ordinarily apply in both the private and public sectors. Hodges is on target when she observes that a typical situation arousing a court's ire will involve an arbitrator's reinstatement of an alcoholic file clerk in some agency. Yet the reinstatement of an alcoholic bus driver (or airline pilot) employed by a private company creates a far greater potential danger for the public. If unique constraints are to be imposed in public employment, that should be a function of the citizens' elected or appointed representatives acting upon the problem as a general matter, not the function of a court dealing with a solitary arbitral award.

Lastly, it may be contended that the extensive statutory regulation of public employment justifies closer judicial scrutiny of arbitral awards to prevent conflict between them and overlapping legislation. Superficially, there is merit in this position, but Hodges is right in rejecting it in the end. As long as the parties have properly authorized the arbitrator to construe or apply a statute, expressly or impliedly, any error of law should be treated essentially the same in the public sector as in the pri-

34. See, e.g., Summers, *Public Sector Bargaining: Problems of Governmental Decisionmaking*, 44 U. CIN. L. REV. 669-73 (1975); Summers, *Public Employee Bargaining: A Political Perspective*, 83 YALE L. REV. 1156, 1192-97 (1969); H. WELLINGTON & R. WINTER, *THE UNIONS AND THE CITIES* 21-30 (1971).

vate. The key is that the arbitrator is fulfilling a *contractual* commission by the parties to render a certain statutory interpretation, which they have agreed to accept as final and binding. A court in enforcing the arbitral award is not placing its imprimatur on the arbitrator's interpretation; it is simply holding the parties to their agreement. The only exception is if the public employer has exceeded its authority in agreeing to arbitrate. And, naturally, if the agency could not have entered into a contract with the union embodying the terms of the award because they were illegal or ordered illegal acts, a court should not enforce the award, just as it would not enforce a contract to the same effect. A final qualification is that third parties, such as individual employees, may have statutory rights personal to them, which cannot be waived by their employer or union, either directly or through arbitration.³⁵

The remaining papers in this Symposium, as well as Clyde Summers' Kenneth M. Piper Lecture for 1990, deal with collective bargaining and arbitration in employment settings that lack a traditional majority union serving as exclusive bargaining representative. Summers' lecture makes an ideal bridge because he analyzes the situation lying somewhere between majority union and no union—the case of the minority union. Since his piece technically falls outside the Symposium, I shall largely confine myself to a doffing of the cap to this old master. His thesis in *Unions without Majority—A Black Hole*³⁶ is the kind we have come to expect from him—original, provocative, constructive, and timely.

Summers maintains that in the absence of a majority union exercising the power of exclusive representation, a minority union should be entitled to represent its members in disciplinary hearings and to strike or picket to back up its demands upon an employer. He even argues what many might consider the unthinkable, at least until exposed to his persuasiveness: section 8(a)(5) of the NLRA obligates employers to bargain collectively with minority unions. More practically, Summers suggests particular roles for minority unions. They may provide the shield of “concerted activity” to remove the vulnerability of individual protesters under *Meyers Industries*.³⁷ They may help workers to understand and pursue their numerous employment rights under federal and state statutes and the developing common law. And of course they may serve as halfway houses on the way to full-fledged majority status.

These views are not quixotic. For example, although Summers does

35. Cf. *Barrentine v. Arkansas-Best Freight Sys.*, 450 U.S. 728 (1981) (arbitral award cannot bar employee claims under Fair Labor Standards Act).

36. 66 CHI.-KENT L. REV. 531 (1990).

37. 281 N.L.R.B. No. 118, 123 L.R.R.M. 1137 (1986).

not mention it, several public sector unions, such as the American Federation of State, County, and Municipal Employees, have successfully used as an organizing device the representation of nonunion government workers in civil service proceedings.

David Lewin, in *Grievance Procedures in Nonunion Workplaces: An Empirical Analysis of Usage, Dynamics, and Outcomes*,³⁸ comes up with some figures that are not surprising, and others that are. Perhaps not so startling, a recent survey shows that almost half the nonunion businesses covered have written grievance procedures for some employees. On the more surprising side, about one-fifth of these procedures include third-party arbitration. I am left a little uncomfortable by Lewin's reliance on a study of a single nonunion company for several of his findings, but at least they are intriguing. For example, he challenges the famous "exit-voice" theory of Albert Hirschman³⁹ and Richard Freeman⁴⁰ by pointing out that nonunion grievance procedures are more likely to be used by employees who intend to leave their employer.

Contrary to the soothing assurances I have heard from business representatives, Lewin concludes, on the basis of data from five firms, that grievance filers have significantly higher turnover rates and significantly lower performance ratings and promotion rates than nonfilers in the post-grievance period, even though there were no significant differences between filers and nonfilers preceding the grievance. Lewin concedes this might conceivably be attributed to more careful personnel assessments following the grievance. But I gather the likelier explanation is employer reprisals, subtle or not so subtle, against the grievance filers.

The propriety of participating in nonunion arbitrations has become a bone of contention within the National Academy of Arbitrators.⁴¹ In addition to the concerns reflected in Lewin's paper, there is worry that such procedures are simply union-avoidance devices and that the deck is heavily stacked against the grievant, who is a one-time player against the repeater employer. On the other hand, it can be argued that granting the employee some substantive and procedural rights is better than nothing, and that there is a growing group of plaintiffs' lawyers who can help redress the imbalance between the parties. My personal experience, though limited, lends support to both positions. Along with a former

38. 66 CHI.-KENT L. REV. 823 (1990).

39. A. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY* (1970).

40. R. Freeman, *The Exit-Voice Tradeoff in Labor Markets: Unionism, Job Tenure, Quits, and Separations*, 94 Q. J. ECON. 643 (1980).

41. See, e.g., Walt, *Employer Promulgated Arbitration Systems Raise Questions*, *The Chronicle* (NAA Journal), Oct. 1989, at 2, col. 1.

president of the National Academy, I was appointed to a rotating panel of arbitrators for a nonunion enterprise. Each of us had a couple of cases in which the grievants were obviously guilty and we duly sustained the discharges. Then came closer calls—momentary misconduct against the background of long and praiseworthy records—and we put the terminated employees back to work. Neither of us has yet been asked to serve again. Would prior knowledge of those consequences have affected our—or any other arbitrators’—decisions? I surely hope not. But at any rate the process has benefited several workers who otherwise would have been out on the street.

Samuel Estreicher and Matthew W. Finkin provide less empirical but wider-ranging studies of arbitration in nonunion contexts. In Estreicher’s article, *Arbitration of Employment Disputes without Unions*,⁴² and Finkin’s *Commentary*⁴³ on it, the two scholars prove worthy of each other’s steel as they cross swords on the appropriate scope of arbitration in resolving individual employment disputes. Estreicher comes out as the doughty champion of voluntarism and the capacity of employees, both sophisticated executives and unsophisticated rank-and-filers, to agree to channel not only contractual but also statutory claims to arbitration, subject to the preservation of an adequate prearbitral role for the relevant administrative agency and “meaningful” judicial review of the arbitrator’s award in cases involving statutory rights.

Finkin will have none of this accommodation between the private arbitration system and protective labor law. He stands four-square for the proposition that “statutory rights . . . are best entrusted to public tribunals.”⁴⁴ Along the way, Finkin would read the Federal Arbitration Act, which strongly and preemptively supports arbitration agreements, in a wholly literal fashion and exclude all contracts of employment⁴⁵ from its coverage. Here, too, Estreicher would seek instead an accommodation between the FAA and applicable labor legislation. This rude summary of mine does an injustice, needless to say, to the refined and perceptive arguments of both authors.

Regardless of the outcome of the debate over the FAA’s applicability to individual employment contracts (Finkin should easily prevail if “textualism” has indeed become the fashion of the day), I believe Estreicher makes a good case that private arbitration has an important part to play, even in disputes over statutory claims, unless the legislation itself

42. 66 CHI.-KENT L. REV. 753 (1990).

43. 66 CHI.-KENT L. REV. 799 (1990).

44. *Id.* at 809.

45. 9 U.S.C. § 1.

provides otherwise.⁴⁶ Safeguards must of course be installed to ensure that statutory rights are not impaired. That will probably mean more searching judicial review than we are used to when only contract claims are at stake.⁴⁷ There will also need to be close scrutiny of possible coercion, surprise, or other overreaching by a more powerful employer. With those qualifications, however, what we should have is a freely bargained agreement between consenting adults, *not* prohibited by law, to invoke a process that may furnish both parties with a quicker, cheaper, and simpler solution to their controversy than the law itself. I have to admit there may be some inconsistency between my position here and my earlier objection to the NLRB's deferral of individual discrimination charges to contractual arbitration under a collective bargaining agreement. But I am still enough of an individualist to think there is a difference between an employee who agrees on her own to take her statutory claims to arbitration in the first instance rather than to court and an employee who suddenly finds her access to the Board for the vindication of statutory rights cut off by an agreement between her union and her employer. That is especially true if the union intended the arbitration route merely as an extra option, not as a mandatory alternative.

In discussing the growing number of grievance-arbitration systems unilaterally established by nonunion employers, Estreicher and Finkin also clash over the implications of the long-neglected section 8(a)(2) of the NLRA, which prohibits company unions. Some firms, to make their procedures more accessible and attractive, even provide grievants with free representation by members of the company's personnel department or place fellow employees on the adjudicatory body. For Estreicher, the key to the nonapplicability of section 8(a)(2) in these situations is the absence of any "*collective* representation of employee interests"⁴⁸ designed to "undermine the conditions for forming a truly autonomous institution"⁴⁹ as bargaining agent. To Finkin, however, the schemes Estreicher would approve are just latter-day versions of the ancient employee-management "joint councils" and similar "cynical efforts to

46. The Supreme Court recently held that an individual employee who had agreed to arbitrate all employment disputes could be required to submit a claim under the Age Discrimination in Employment Act to arbitration. *Gilmer v. Interstate/Johnson Lane Corp.*, 59 U.S.L.W. 4407 (U.S. May 13, 1991).

47. Technically, as I see it, an individual arbitration agreement covering statutory claims brings the matter before the arbitrator as a *contract* issue between the parties. Estreicher elaborates on this point, *supra* note 42, at 775. But when sensitive rights under antidiscrimination and other protective labor laws are intimately involved, regardless of their theoretical nature in a given proceeding, I doubt that the courts will remain aloof and let an arbitrator mangle an employee's claim.

48. See *supra* note 42, at 773 (emphasis supplied).

49. *Id.*

counter unionization,"⁵⁰ which the legislative history makes clear were exactly the sort of devices Congress intended to banish by adopting the original section 8(2) of the Wagner Act.⁵¹

Finkin has a lot going for him in the 1934-35 legislative history.⁵² He can even contend, with considerable justification, that the Congress of that day deliberately chose what we now would call the adversarial model of labor relations in preference to the contrasting cooperative model. Yet perhaps it is not a real betrayal of legislative intent to read the words on the yellowing pages of the statute book with an awareness of the vastly changed circumstances since the blue-collar, downtrodden working world of the 1930s.⁵³ Context shapes meaning. Some of us outsiders may deem the employees of today's high-tech firms short-sighted in overlooking the benefits of unionization, but if they knowingly and freely accept a different format for dealing with their employers in the post-industrial era, I do not feel the language of sections 2(5) and 8(a)(2) is so clear and unyielding as to constitute an insuperable barrier to their desires.

Finkin does not address the last part of Estreicher's article, in which he suggests that an administrative agency rather than arbitration would be the best means of enforcing any new legislation in this country requiring good cause for the dismissal of employees. Estreicher's views are of special interest to me, because I was the principal draftsman for a committee of the Uniform Law Commissioners that prepared the new Model Employment Termination Act.⁵⁴ As Estreicher indicates, the drafting committee opted for arbitration as the preferred method of enforcement,

50. See *supra* note 43, at 814.

51. 49 Stat. 452 (1935).

52. See generally Kohler, *Models of Worker Participation: The Uncertain Significance of Section 8(a)(2)*, 27 B.C. L. REV. 499 (1986); Note, *Collective Bargaining as an Industrial System: An Argument Against Judicial Revision of Section 8(a)(2) of the National Labor Relations Act*, 96 HARV. L. REV. 1662 (1983). For other views, see Moberly, *New Directions in Worker Participation and Collective Bargaining*, 87 VA. L. REV. 765 (1985); Note, *Participatory Management Under Sections 2(5) and 8(a)(2) of the National Labor Relations Act*, 83 MICH. L. REV. 1736 (1985); Note, *New Standards for Domination and Support Under Section 8(a)(2)*, 82 YALE L.J. 510 (1973).

53. Many persons will probably respond that there are still lots of workers in the 1990s—in the fast-food outlets, the fruit, vegetable, and sugar cane fields, and numerous other menial service occupations—who desperately need the attention of protective, if not paternalistic, labor legislation. We are not talking, of course, about waivers of substantive rights, but only about agreements to channel claims in a particular way. Even there, the courts would have to be vigilant against abuses through misrepresentations, contracts of adhesion, and other means.

54. For the text of the model act as finally approved by the Commissioners on August 8, 1991, see 9A LAB. REL. REP. (BNA) IERM 540:21 (1991). Detailed recommendations concerning the provisions to be included in such a statute may be found in Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481 (1976); St. Antoine, *A Seed Germinates: Unjust Discharge Reform Heads Toward Full Flower*, 67 NEB. L. REV. 56 (1988).

although enforcement through an administrative agency was adopted as an alternate procedure.

Estreicher recognizes two aspects to the claim of expertise as a primary reason for favoring arbitration in wrongful discharge cases. The first is the body of arbitral precedent that has accumulated during half a century of grievance arbitration under collective bargaining since World War II. The second aspect is the availability of a substantial group of expert decisionmakers who may be engaged as independent contractors as required, without the need to establish a large, permanent agency staff at the outset.

Estreicher regards the first portion of this argument as "particularly problematic,"⁵⁵ since arbitration in unionized settings typically involves rank-and-file workers. A more comprehensive wrongful termination statute will generate many claims by supervisory and managerial personnel and other higher-level employees exercising considerable discretion. There is force to this objection, but I think it gravely underestimates the capacity of a sound decisionmaking system to produce a set of general principles that may profitably be adapted to apply in quite different contexts. Canada now uses private arbitrators as adjudicators under its wrongful discharge legislation, which covers the federally regulated sector of employment.⁵⁶ That country's most noted management attorney has assured me that he finds no serious problem as an advocate in arbitrating under the Canadian statute's just cause standard, regardless of the level or status of the employees involved.⁵⁷

Although Estreicher finds more merit in the second part of the reason for using arbitration, namely, the ready availability of expert decisionmakers, he winds up by questioning whether the need to handle large numbers of cases wouldn't justify the use of an administrative agency with a regular cadre of civil servants who could quickly develop the requisite experience. Ultimately, the choice between private arbitrators and a new or established agency is highly pragmatic. For me, however, a state would maintain maximum flexibility by relying on outside ad hoc arbitrators while moving into this uncharted area, with a pending caseload that simply cannot be predicted at this time.⁵⁸ Furthermore, against the background of a dwindling demand for their services from the

55. See *supra* note 42, at 794.

56. CANADA LABOUR CODE § 240 *et seq.*, Stats. Canada, 1977-78, 26-27 Eliz. II, c. 27 at 9-12.

57. Conversation with Roy L. Heenan, Esq., of Montreal, Quebec, August 1988.

58. As Estreicher observes, one careful scholar has estimated that of approximately two million nonprobationary, nonunion employees discharged annually, about 150,000 would have a cause of action under a just cause standard. See *supra* note 42, at 793 (citing Stieber, *Recent Developments in Employment-at-Will*, 36 LAB. L. J. 557, 558 (1985)). Lack of central reporting prevents accurate

unionized sector, the skills of private arbitrators are constantly being enhanced, and their numbers augmented, through training and development programs conducted by the American Arbitration Association, the National Academy of Arbitrators, and various professional and educational organizations.

Estreicher proceeds by listing several disadvantages he finds in arbitration as compared with administrative agencies. I think his first, constitutional concern can be easily cured in most states by having the arbitrator, whether selected by the parties or appointed by a state agency, formally invested with the powers of office by a government official.⁵⁹ Next, Estreicher worries about the cost effectiveness of using private arbitrators whose per-diem fees may range upwards of \$400. Now, of course, the state may set the fees any way it wants, as the model act recognizes. But apart from that, free enterprise can be counted on to spur high productivity. In my experience, few salaried government decisionmakers come close to matching the output of 100 or more cases a year handled by the full-time professional arbitrator.

There is a screening problem that Estreicher correctly identifies. Ordinarily, arbitrators do not weed out nonmeritorious cases in advance of a hearing. But I think that Estreicher exaggerates the efficiency that would be lost by entrusting that preliminary function to the agency administering the arbitration process. Earlier drafts of the model act would have so provided. Both the management and plaintiff representatives advising the drafting committee recommended deleting the screening step on the grounds that it would be a mere formality. I am not wholly satisfied with the result. At the time the committee made the decision, it was still likely that complainant employees would be required to pay half or a substantial part of the arbitration costs; that would obviously have served as a built-in screening device. Later the committee reached the quite principled conclusion that the state should bear nearly all the costs of the adjudicatory process. That raises the screening issue anew, but I consider this an entirely separate question from the desirability of arbitration.

I accept the main thrust of Estreicher's last two points, namely, the need for due process and fuller judicial review in publicly mandated proceedings. But at most these would reduce some of the relative advantages of private, contractual arbitration; they are not disadvantages of

figures on the current rate of suits on common law theories, but I have heard knowledgeable active practitioners say there may be around 10,000 a year.

59. See, e.g., *City of Detroit v. Detroit Police Officers Ass'n*, 408 Mich. 410, 294 N.W. 2d 68 (1980), *app. dismissed*, 450 U.S. 903 (1981).

arbitration vis-à-vis administrative processes. In any event, due process in a very genuine sense has become an accepted component of well-conducted contractual arbitration.⁶⁰ And, recognizing the validity of concerns like Estreicher's second, the final version of the model act lists a "prejudicial error of law" among the grounds for vacating an arbitrator's award.

One of the most specific proposals I have seen for using an administrative agency to enforce a wrongful termination statute would place responsibility in the hands of the state's unemployment compensation commission.⁶¹ Procedurally, that is wholly appropriate. Substantively, and perhaps psychologically, I think it is ill-advised. From the perspectives of both employer and employee, it would be a mistake to muddle the criteria for discharge and for compensation. Employees whom an employer should be entitled to terminate may be deserving of unemployment compensation. There could even be cases when the converse would be true. Theoretically, of course, a hearing officer could be directed to apply quite different standards in rendering the different judgments. But I believe the distinction can be much better maintained by keeping the functions separate.

The genius of the common law is its flexibility and adaptability—its capacity to generalize from particulars, and then derive a new particular from the generalization. Underlying this entire Symposium is an analogous theme—the capacity of private, contractual arbitration to adapt to a widely varying new world of employer-employee relations. The institution may go all the way from the private, contractual arbitration of statutory issues to public, contractual arbitration and eventually reach publicly mandated statutory arbitration in the private sector. I hope I am not being too professionally chauvinistic in thinking this now-almost-venerable process is fully up to the challenge.

60. See, e.g., Aaron, *The Role of the Arbitrator in Ensuring a Fair Hearing*, in NAT. ACAD. ARB., PROC. 35TH ANN. MEETING, ARBITRATION 1982—THE CONDUCT OF THE HEARING 30-49 (J. Stern & B. Dennis eds., 1983); Fleming, *Due Process and Fair Procedure*, in ARBITRATION IN PRACTICE 68-78 (A. Zack ed., 1984).

61. Bellace, *A Right of Fair Dismissal: Enforcing a Statutory Guarantee*, 16 U. MICH. J. L. REF. 207 (1983).